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No. 06-134

In The Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS AND THE PERMANENT REPRESENTATIVE OF MONGOLIA TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

I. Actions to Declare the Validity of Tax Liens Do Not Put Rights in Immovable Property in Issue.

The City of New York ("the City") argues that its lawsuits fit within the plain text of 28 U.S.C. § 1605(a)(4) because a "property tax lien is a right that the lien holder has in the property of the fee owner." Brief for Respondent ("Resp. Br.") at 8. This argument was rejected by the Second Circuit. Pet. App. at 21. It is unsupported by the authorities cited by the City. And, if adopted by this Court, it would allow local governments to abrogate sovereign immunity for any claim merely by passing a statute automatically converting the claim into a lien.

A. A Lien Is Not a Right in Immovable Property.

The authorities cited by the City do not support its argument that liens were defined as rights in immovable property when Congress enacted 28 U.S.C. § 1605(a)(4) in 1976. The City cites to Section 1 of a chapter in American Jurisprudence for the proposition that a lien is a "qualified right of property" (Resp. Br. at 8 n.4), but it ignores Section 2 of the same chapter, entitled "Nature of the right or interest," which states: "However, it has also been held that a lien is not a property right or proprietary interest in land or an estate in land and that it confers no ownership interest or general right of property or title upon the holder. . . ." 51 Am. Jur. 2d, Liens § 2 (2003); *see also* 75 N.Y. Jur. 2d, Liens § 5 (2000) (a lien "confers no general right of property upon the holder"). Similarly, the City quotes from a 1999 version of Black's Law Dictionary to argue that a lien is a property interest (Resp. Br. at 8) without disclosing that Black's stated in 1976 that a lien

"is not a property in or right to the thing itself." Black's Law Dictionary 1072 (4th ed. 1951).[1]

Contemporaneous New York decisional law confirms that liens were not considered "rights in immovable property" when Congress enacted the FSIA, and are not considered rights in immovable property today. The City does not deny that before 1976, New York's courts had held that a "lien was not a claim to 'an estate or interest in the real property.'" *Weinstein v. Taylor*, 234 N.Y.S.2d 926, 929 (N.Y. Sup. Ct. 1962), *aff'd mem.*, 242 N.Y.S.2d 707 (N.Y. App. Div. 1963); *see also Stickler v. Ryan*, 61 N.Y.S.2d 708, 709 (N.Y. App. Div. 1946) (mortgage lien does not "create any estate or interest in real property. It is a mere chose in action, held as collateral security for the payment of a debt."). Instead, the City points out that a 1977 statute amended New York law on a jurisdictional issue decided in *Weinstein v. Taylor*.[2] The amendment, which prescribes the jurisdiction of the New York Court of Claims, states: "*For purposes of this act only*, a real property tax lien shall be *deemed* to be an interest in real property." N.Y. Court of Claims Act § 9 (emphasis added).[3] If a lien had been

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[1] The Fourth Edition is the relevant source because it was the latest edition of Black's Law Dictionary available in 1976 when the FSIA was enacted. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 745 (1996) (looking to dictionaries from the era in which the statute was passed); *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610-12 (1987) (same).

[2] The City does not explain how an amendment to a state statute in 1977 is relevant to Congress's understanding of the nature of liens when it enacted the FSIA in 1976.

[3] *L-C Security Serv. Corp. v. State of New York*, 434 N.Y.S.2d 883, 884 (N.Y. Ct. Cl. 1980) explains that the purpose of the amendment was to bring the claims of lienors into the Court of Claims as "the exclusive forum for both the assessment and distribution of damages in appropriation cases," not to change the organic nature of liens. *Id.* at 885.

understood to be a right in real property, there would have been no need for New York's Legislature to enact a law "deeming" a lien to be an interest in property for purposes of state court jurisdiction, and to adopt the amendment "only" for purposes of defining jurisdiction in the Court of Claims.[4]

This Court's decision in *Marshall v. Knox*, 83 U.S. 551 (1872), does not recognize liens to be rights in immovable property themselves. The "property" in dispute in that case was personal property (farm equipment), not real property. Furthermore, the full sentence, which page 8 of the City's Brief has clipped short, reveals that the Court was *not* referring to a lien, even on personalty, but rather to the claim for possession of the personal property: "*The claim*, however, *is to the right of possession,* and that right may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and is, in fact, a species of property just as much as the subject of litigation as the thing itself." *Marshall*, 83 U.S. at 557 (emphasis added).

The "takings" cases cited by the City hold only that a lienor has a personal property interest in the lien itself.[5]

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[4] The other cases that the City cites as holding that liens are interests in property for purposes of state statutes allowing notice by publication for actions to quiet title (Resp. Br. at 11) also confirm that these procedural statutes were not intended to alter substantive law holding that liens are not rights in the underlying real property. *Ormsby v. Ottman*, 85 F. 492, 495 (8th Cir. 1898) ("a mortgage or judgment lien was no interest, estate, or title in the property itself"); *Clark v. Darlington*, 63 N.W. 771, 772 (N.D. 1895).

[5] *Pasquantino v. United States*, 544 U.S. 349, 356 (2005) (right to collect taxes, right to sue on a debt, and right to be paid money are forms of *personal* property); *Armstrong v. United States*, 364 U.S. 40 (1960) (government took property when it extinguished liens); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (notice due mortgagee before affecting tax-sale proceedings); *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) (statute affecting liens construed to avoid a

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Petitioners agree that money claims, and the liens that serve as a means of enforcing those claims, may each be "property" for whose "taking" the government must provide compensation under the Fifth and Fourteenth Amendments. But that unexceptionable proposition does not mean that claims on liens are rights in immovable property within the meaning of the FSIA. Just as a legal claim against another party does not become a right in the other party's property simply because the owner of the claim has a property interest in the claim, a statutory lien does not become a right in the underlying real property simply because the lienor has a property interest in its lien.

B. Servitudes Are Very Different From Liens.

Seizing on language in the FSIA's legislative history suggesting that section 1605(a)(4) allows jurisdiction over foreign states "to adjudicate questions of ownership, rent, servitudes and similar matters," the City argues that liens are "similar" to servitudes. Servitudes diminish the property owner's exclusive right to use and possess the property by giving a dominant tenement the right to access the property (a positive easement) or the right to limit the servient tenement's full use of the property, such as restrictions on blocking the dominant tenement's light or view (a negative easement). *See* 5 Restatement (First) of the Law of Property § 450 (1944). Unlike servitudes, liens

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constitutional question under the Takings Clause of the Fifth Amendment); *First State Bank-Keene v. Metroplex Petrol., Inc.*, 155 F.3d 732, 739 (5th Cir. 1998) (tax sale did not deprive FDIC of property rights because purchaser took the property subject to FDIC's lien); *Matagorda Co. v. Russell Law*, 19 F.3d 215, 224 (5th Cir. 1994) (FDIC's actions delaying local government's ability to foreclose on tax liens did not constitute a Fifth Amendment taking).

do not diminish the real property owner's right to exclusive use and possession of its property, nor do they grant the lienor any right to use or access the real property. Indeed, New York courts have recognized that easements are fundamentally different from liens in this respect, explaining that "[a]n easement is not a lien, encumbrance or charge against the servient estate, but is something carved out of it for the benefit of the dominant estate." *Clove Lakes Serv. Corp. v. Greif Bros. Cooperage Corp.*, 346 N.Y.S.2d 668, 670 (N.Y. Sup. Ct. 1973).

The fact that an unsatisfied lien may have an impact on the potential sales price of underlying property does not make a lien "similar" to a servitude or easement. The potential financial impact of an unsatisfied lien does not "carve out" any rights in the property for the benefit of the lienor, nor does it "carve out" any of the property owner's rights to exclusive use and possession of the property or to collect rents. And, unlike the dominant tenement's rights in an easement, which cannot be extinguished unilaterally by the servient tenement (49 N.Y. Jur., Easements and Licenses in Real Property § 160 (2006)), a lien may be extinguished unilaterally by paying the debt or claim the lien is meant to secure, because the lienor has no rights in the underlying property. *See* N.Y. Real Prop. Tax Law § 1110(1) (2007).

An action to declare the validity of a lien does not put in issue any of the types of ownership, use, and possession rights that are in issue in a dispute over the validity of a servitude or easement. While a lien may be "related to" or "arise out of" the real property owner's use of its property, Congress did not draft a real property exception covering all disputes "related to" or "arising out of" real property. Instead, Congress limited the scope of section 1605(a)(4) to cases in which "rights in" immovable property are "in issue." Similarly, in the enforcement sections of the FSIA,

Congress allowed execution against certain property for judgments "establishing rights in property." 28 U.S.C. § 1610(a)(4).[6] Congress's requirement that a judgment be one "establishing rights in property" to allow execution under section 1610(a)(4) confirms that in order to put rights in immovable property "in issue" to support jurisdiction over a foreign state, the claims must seek to "establish[] rights in" the property. In all events, Congress's choice of statutory language precludes a construction that would abrogate sovereign immunity for all claims "arising out of" or "related to" real property.[7]

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[6] Section 1610(a)(4) provides:

> "The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if – . . .
>
> (4) the execution relates to a judgment establishing rights in property –
>
> (A) which is acquired by succession or gift, or
>
> (B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission. . . .

[7] Nor does the "local action rule" justify an abrogation of sovereign immunity for actions to declare the validity of tax liens. As then-Judge Scalia explained in *Asociacion de Reclamantes v. United Mexican States*, the local action rule exists because "[a] sovereignty cannot safely permit the title to its land to be determined by a foreign power." 735 F.2d 1517, 1521 (D.C. Cir. 1984) (quoting 1 F. Wharton, Conflict of Laws § 278 (3d ed. 1905)). A subsidiary concern is "that courts are simply not well equipped to decide property interests or rights to possession with regard to land outside their jurisdiction, particularly land located in a foreign nation." *Id.* These rationales limit the local action rule to "questions that directly implicate interests in the property or rights to possession." *Id.* Even if some states provide that lien disputes must be resolved in local courts, the underlying rationales for the local action

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C. New York City's Lien Theory Would Improperly Create Jurisdiction For Claims Against Foreign Sovereigns Where No Jurisdiction Would Otherwise Exist.

According to the City, whenever any claim is converted into a lien by operation of local law, the claim is converted into a dispute over rights in immovable property. This lien theory of jurisdiction would abrogate immunity and create jurisdiction under the FSIA for all sorts of claims where no jurisdiction otherwise would exist. Some states apply statutory liens to both real and personal property even though the claimed tax delinquency arises only as to personal property, and the government may enforce the lien against the real property, without bothering to proceed first against the personal property. 5 Powell on Real Property § 39.04[2] (2006). Under the City's lien theory of jurisdiction, such enforcement suits could proceed against a foreign sovereign's real property, even though nothing in the FSIA provides any colorable basis for jurisdiction over personal property tax claims. Nor is there any basis for limiting the City's lien theory to statutory tax liens. For example, although the City agrees that the FSIA provides no jurisdiction over zoning or nuisance claims (Resp. Br. at 29), under its lien theory the local jurisdiction need only create a statutory lien on the offending property to provide a suitable basis for jurisdiction under section 1605(a)(4).

The City's lien theory of jurisdiction is also inconsistent with the FSIA's prohibition of the use of pre-judgment

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rule do not support a construction of section 1605(a)(4) that would require all inter-government disputes over the imposition or collection of taxes to be resolved in local courts.

attachment on a foreign sovereign's real property to obtain jurisdiction where no personal jurisdiction would otherwise exist. *See* 28 U.S.C. §§ 1609, 1610(d)(2); H.R. Rep. No. 94-1487 at 26-27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6625-26. If a party cannot gain access to the courts to recover money allegedly owed by a foreign state through judicial attachment of that foreign state's real property, then the City should not be allowed to obtain jurisdiction over the Governments of India and Mongolia to adjudicate the validity of a lien on their real property in order to enforce a claim upon which the City could not recover directly. The FSIA requires that (except for commercial maritime liens) jurisdiction over foreign sovereigns must be established on an *in personam* basis.

II. Congress Did Not Intend Statutory Tax Liens to Be Included Within the Meaning of Rights in Immovable Property.

A. The Second Restatement Recognized that Foreign Sovereigns Were Immune from Tax Enforcement Suits Under the "Restrictive" Theory of Sovereign Immunity.

The City concedes that the FSIA was intended to codify preexisting international law under the restrictive theory of sovereign immunity, and that the Restatement (Second) of Foreign Relations Law (1965) ("Second Restatement") is an authoritative reflection of those principles.[8]

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[8] The City refers to a "Draft Convention" at pp. 21-22 of its brief. The Draft Convention on the Competence of Courts in Regard to Foreign States was published in 1932 in a supplement to the American Journal of International Law as "an endeavor to offer a set of rules on this subject [of jurisdiction over foreign sovereigns] which may prove acceptable to the States of this world." 26 Am. J. Int'l Law Sup. 455,

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Resp. Br. at 19, 21. It even cites, as one of these recognized principles, the principle set forth in Section 65 of the Second Restatement that the "general rule" of sovereign immunity "prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state." The City buries this principle in a footnote, but even the footnote summary is clear enough: "Foreign government property is immune from tax enforcement." Resp. Br. at 22 n.19.[9] There is no genuine dispute that the present cases assert claims for tax enforcement. The City describes its asserted tax liens as having been specially created by statute to "enforce" a property owner's alleged "obligations" to "local governance," in this case the payment of real property taxes. Resp. Br. at 18.[10]

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474 (1932). The convention did not "purport" to be "a declaration of existing international law." *Id.*

[9] *Amici*, International Municipal Lawyers Association and the U.S. Conference of Mayors (collectively "Municipal Lawyers"), erroneously argue that a foreign sovereign's immunity from tax enforcement lawsuits was a relic of the "absolute" theory of immunity that "prevailed prior to the Tate Letter" of 1952. Mun. Lawyers Br. at 10. The Second Restatement applies the "restrictive" theory. Second Restatement § 69, reporters note 1.

[10] The FSIA's legislative history contains no "representations by the Executive Branch" to Congress that the text of § 1605(a)(4) would provide a basis for a lawsuit to enforce a foreign sovereign's "tax obligations." Mun. Lawyers Br. at 13. Shorthand descriptions by officials of the Departments of State and Justice of the statutory text as applying to "estate and real estate matters" (*id.* at 14) must be understood in the context of the remainder of the quoted sentence, which describes the proposed immovable property exception as "in keeping with the law at the present time." Immunities of Foreign States: Hearing on H.R. 3493 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 93rd Cong. 41 (1973). As we showed in our opening brief at pp. 17-28, the "law at the present time" was that a local government "may not compel the payment of a tax by proceeding directly against a foreign sovereign's property."

The Second Restatement accurately reflects existing international principles as they were understood in the United States when Congress adopted those principles in the FSIA. It is a far more reliable source for the restrictive theory of sovereign immunity as it was understood in 1976 than the Third Restatement, which was published ten years after the FSIA was enacted.[11]

B. Pre-FSIA Case Law Precluded Enforcement of Tax Liens Against Foreign Sovereigns.

The only relevant case decided between the 1965 publication of the Second Restatement and the 1976 enactment of the FSIA squarely held that a local government may not compel the payment of a tax by proceeding against the foreign sovereign's property. The New York Court of Appeals' decision in *Republic of Argentina v. City of New York*, 25 N.Y.2d 252 (1969), explicitly relied on Second Restatement § 65 cmt. d to support its conclusion that the City of New York "may not compel the payment of a tax by proceeding directly against the [foreign sovereign's] property." 25 N.Y.2d at 262. The New York court's ruling, like the Second Restatement on which it relies, applies the "restrictive" theory of sovereign immunity, *see* 25 N.Y.2d at 265, and it cannot be explained away, as the

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[11] Furthermore, not only does the Third Restatement offer no basis for its interpretation of § 1605(a)(4), its interpretation is flatly inconsistent with that of the immediately preceding exemption, which uses identical language. 28 U.S.C. § 1605(a)(3) exempts from sovereign immunity certain cases "in which rights in property taken in violation of international law are in issue," yet § 455 comment c to the Third Restatement reads this identical "rights in property . . . are in issue" language as "limited to actions asserting title to property and claims for compensation" for taking that property. Restatement (Third) of the Foreign Relations Law of the United States § 455 at 413 (1986).

City suggests it might, as a case that was "instituted by a foreign sovereign." Resp. Br. at 26. Argentina was the plaintiff, challenging the assessment of a tax against its consulate, but the court's ruling in its favor – that the consulate was not subject to tax or to a tax lien – depended on its underlying determination that the City could not enforce a tax claim in court. *See* Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1256 (2006) (holding explains "why the court's judgment goes for the winner"). It is likewise immaterial that the property at issue in the *Argentina* case was used as "consular offices, not staff housing." Resp. Br. at 34 n.31. In the *Argentina* case, as in the present case, the City claimed the right to tax any foreign government property that was not specifically exempt from taxation under local law – there a consulate, here Mission premises used to house diplomatic staff. Both are, in the words used by the New York court, used for "public" or "governmental" purposes. 25 N.Y.2d at 265.

The City's reliance on two rulings by county courts in New York State, both rendered before the Second Restatement and before the ruling by New York State's highest court, is misplaced. That the county court in *City of New Rochelle v. Republic of Ghana,* 255 N.Y.S.2d 178, 179 (Westchester Cty. Ct. 1964), initially asserted subject-matter jurisdiction over the City's tax-foreclosure claim shows only that before the FSIA, "a plea or suggestion of immunity" was thought to arise "only after the court has been vested with jurisdiction." Richard Pugh & Joseph McLaughlin, Jurisdictional Immunities of Foreign States, 41 N.Y.U. L. Rev. 25, 27 (1966). Whatever the prevailing view may have been before 1976 about the relationship between "jurisdiction" and "immunity," that view has been overtaken by the FSIA, which created a new jurisdictional regime where "at the threshold of every action . . . against

a foreign state" the court's subject matter jurisdiction depends on whether the plaintiff can carry its burden of establishing that one of the FSIA's exceptions applies. *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004).

Amici Municipal Lawyers inaccurately depict the *New Rochelle* case as one in which "no suggestion of immunity was made." Mun. Lawyers Br. at 18-19. That description is controverted by the court's description of the case as one in which "the executive branch of the United States Government has recognized a claim of immunity." 255 N.Y.S.2d at 179. The court also described the Government's brief as supporting the foreign sovereign's immunity from a proceeding to enforce the city's lien claim judicially, in that case by foreclosure. 255 N.Y.S.2d at 180. The Government's brief did not preclude the mere assertion of a presently unenforceable "inchoate" lien, but even that nonlitigation option was later rejected by New York's Court of Appeals in the *Republic of Argentina* case. In that later case, the lower court found "no impediment to the assessment" (as distinct from the enforcement) of the City's liens, *Republic of Argentina v. City of New York*, 283 N.Y.S.2d 389, 392 (N.Y. Sup. Ct. 1967), but the Court of Appeals ultimately rejected even the validity of an unenforced "inchoate lien." *Republic of Argentina v. City of New York*, 25 N.Y.2d at 262.

The City also cites some "cases" from "other countries," but only two of these cases involved any sort of tax claim. The first involved Italy's lawsuit in an Argentine court for return of an inheritance tax surcharge it had paid on a bequest. In ruling against Italy, the local court found that, by suing as a plaintiff, "'[t]he government of the Kingdom of Italy has consented to submit itself to the courts of this nation.'" *Gobierno de Italia v. Consejo Nacional de Educacion,* 10 Ann. Dig. 196 (Camera Civil de la Capital 1940) (Arg.). The other is the Canada Supreme

Court's ruling that we discuss at pp. 21-22 of our opening brief, which holds that "under the principles of the law of nations" a host state's tax claim was "not exigible" against a foreign state's public property. *Reference re Tax on Foreign Legations*, [1943] 2 D.L.R. 481 (Can.). That is the principle of the law of nations set forth in Section 65 of the Second Restatement.

Each of the other cases that the City cites involved disputes over "adverse ownership interests" within the ambit of Section 68(b) of the Second Restatement or indisputably commercial activities. Some were brought by previous owners whose titles had been wrongly expropriated,[12] while others were brought to enforce contractual obligations: to pay rent,[13] or to allow repairs under a lease,[14] or to compel interest payments on a mortgage.[15] As for the others, one was an action to execute judgment on an arbitral award, and that judgment was later vacated

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[12] *Restitution of Property (Republic of Italy) Case*, 18 I.L.R. 221 (Ct. of App. of Hamm. 1951) (F.R.G.); *Jurisdiction Over Yugoslav Military Mission (Germany) Case*, 38 I.L.R. 162 (Fed. Const'l Ct. 1962) (F.R.G.); *Claim Against Empire of Iran Case*, 38 I.L.R. 37 (Fed. Const'l Ct. 1963) (F.R.G.).

[13] *Deputy Registrar Case*, 94 I.L.R. 308 (District Court of the Hague 1980) (Neth.); *U.S. Government v. Bracale Bicchierai*, 65 I.L.R. 273 (Ct. of Appeal of Naples 1968) (Italy).

[14] In *Intpro Properties (U.K.) Ltd. v. Sauvel*, 1 Q.B. 1019 (1983), plaintiffs sued to enforce a covenant of the lease that allowed plaintiffs onto the premises to conduct repairs.

[15] In the *Hungarian Embassy Case*, 65 I.L.R. 110, 112 (Fed. S. Ct. 1969) (F.R.G.), the commercial lender was entitled to execute only because the property was vacant, and therefore was not being used "for embassy purposes." Similarly, in *Republic of Latvia Case*, 22 I.L.R. 230 (Higher Ct. of App. 1955) (F.R.G.), though the nature of the dispute is not described, jurisdiction was found because the land had been abandoned and was no longer being used "for diplomatic purposes."

entirely.[16] The other was brought by the foreign sovereign, which thereby waived any immunity.[17]

Section 86 of the Code of Civil Procedure of India (cited in Resp. Br. at 25) cannot support a finding of jurisdiction in the instant cases. Under section 86, no suit may be brought against any foreign state or any corporation owned by a foreign state unless the plaintiff first obtains the consent of the Central Government of India, and we know of no case where the Central Government has granted consent to sue a foreign sovereign for real property taxes.[18]

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[16] *Suit Against Hungary*, 4 Ann. Dig. 174 (1928) (Czech.) was brought to execute an award made by an arbitration tribunal against "immovable property" of Hungary. While the court initially allowed execution, it reversed itself upon learning that the property against which execution was sought was the Hungarian Legation. *Immunity of Legation Buildings (Czechoslovakia) Case*, 4 Ann. Dig. 370 (1929) (Czech.). In vacating its earlier judgment the court wrote, "According to international law objects which directly or indirectly serve the purposes of the diplomatic service are exempt from the operation of municipal law." *Id.* at 372.

[17] The report on the post-Restatement *nisi prius* ruling by a court in Athens, Greece in *Purchase of Embassy Staff Residence Case*, 65 I.L.R 255, 257 (Trib. of First Instance, Athens 1967) (Greece) does not clearly describe the dispute. Because the foreign state was the "plaintiff," the ruling has no bearing on a foreign state's immunity from suit against it.

[18] *See also Amici* Municipal Lawyers' reliance on a 1985 Australian law, section 14(1)(a) of which contains an "immovable property" exclusion and section 20 of which separately excludes any "proceedings" that "concern" a tax obligation, demonstrates only that when nations do assert tax enforcement jurisdiction over foreign sovereigns, they do so explicitly. Foreign States Immunities Act, 1985 (Austl.). Moreover, this 1985 Australian law offers no guidance on what the U.S. Congress was thinking in 1976.

C. The European Convention on State Immunity Contains No Suggestion that Foreign Sovereigns May Be Subjected to Tax Enforcement Suits.

Glossing over the very significant textual differences between section 1605(a)(4) ("rights in immovable property . . . are in issue") and Article 9 of the European Convention on State Immunity ("obligations arising out of . . . rights or interests in, or possession or use of, immovable property"), both the City and its supporting *amici* cite the European Convention as "evidence of the international practice the FSIA was intended to codify." Resp. Br. at 22; Mun. Lawyers Br. at 15-18.

Like the FSIA, the European Convention was intended to codify the "restrictive" theory of sovereign immunity, referred to in the Convention's Explanatory Report as "relative State immunity," under which a foreign state does not enjoy immunity "when it acts in the same way as a private person in relations governed by private law." Council of Europe, European Convention: Explanatory Report, § 1. The Convention's text therefore was drafted solely to describe the private law disputes for which jurisdiction over foreign states would be appropriate. Nothing in the Convention or the practices of signatory states provides any basis for using the Convention's immovable property exception to create jurisdiction for tax enforcement lawsuits against foreign states. For example, the United Kingdom, a European Convention signatory, has a "State Immunity Act" which governs both private and governmental claims against foreign states. Section 6 provides in part that "a [foreign] State is not immune as respects proceedings relating to any interest of the State in, or its possession of, immovable property in the United Kingdom." State Immunity Act of 1978 (U.K.). But the U.K. Act contains a separate and distinct exception for

"rates" (i.e., property taxes) on "premises occupied by it for commercial purposes." *Id.* at § 11(b). This separate exception for property taxes on "premises occupied . . . for commercial purposes" would not have been needed if the "immovable property" exception in Section 6 of the Act had itself been sufficient to subject all property owned by a foreign state to tax enforcement lawsuits.

D. The Purpose of the FSIA Does Not Justify Abrogating Sovereign Immunity for Inter-Government Tax Disputes.

Respondent's assertion that the "purpose" of the FSIA requires that questions of jurisdictional immunity be decided by the courts does not support its argument that jurisdiction exists to decide government-to-government disputes over immunity from taxation. To the contrary, the purpose of the FSIA, as stated in the initial paragraphs of the House Report, is to address a concern that "American citizens" who "com[e] into contact with foreign states and entities owned by foreign states" will have "access to the courts in order to resolve ordinary legal disputes." H.R. Rep. No. 94-1487 at 6-7, 1976 U.S.C.C.A.N. at 6605. The House Report provides as examples "when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price;" or "when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention;" or "when a citizen crossing the street may be struck by an automobile owned by a foreign embassy." *Id.* Nothing in this legislative history suggests that the FSIA was designed to provide an exception for inter-governmental disputes. Nor is the City's lien theory necessary to protect American citizens in disputes with foreign sovereigns. To the extent a private

citizen would have a lien on a foreign sovereign's real property – such as a mechanic's lien for work performed on the premises – jurisdiction would exist under the commercial activities exception and there would be no need for the individual citizen to rely on the rights in immovable property exception.

E. New York City's Immaterial Arguments on the Merits of its Tax Claims Are Wrong.

Although the sole issue presented on certiorari is one of jurisdiction under the FSIA, the City devotes four pages of argument to the merits of its tax claim. This merits argument is premised almost entirely on a series of confusing diplomatic notes with very little legal analysis and vague references to issues such as "common areas."

Petitioners rely, in contrast, on a fairly straight forward analysis of the tax exemptions mandated by the Vienna Convention on Diplomatic Relations and the customary international law it was designed to codify. Under Article 23(1) of the Vienna Convention, foreign states "shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission." Petitioners contend that the "premises of the Mission" include those portions of the Mission building used to house diplomatic staff. This interpretation is supported by a 1986 Notice published by the U.S. State Department in the Federal Register entitled "Property Owned by Diplomatic Missions and Used to House the Staff of Those Missions is Exempt From General Property Taxes." 51 Fed. Reg. 27303 (July 30, 1986). The Notice

explains that Mission-owned property used to house Mission staff constitutes "premises of the Mission."[19]

The tax exemption is also mandated by customary international law. The New York Court of Appeals, rejecting the City's narrow construction of tax exemptions in *Republic of Argentina v. City of New York*, held that the tax exemptions required by customary international law are not limited to property used for a "diplomatic" purpose, but apply to all foreign government-owned property used for a "public" or "governmental" purpose. 25 N.Y.2d at 265. Housing diplomatic staff on Mission premises to facilitate the performance of their diplomatic and governmental functions is as much a "public" or "governmental" purpose as housing soldiers in barracks on a military base or providing sleeping quarters for firemen in a firehouse.

III. Housing Mission Staff in the Premises of the Mission Is Not "Commercial" Activity.

Every "commercial activity" case cited by the City involved a relationship between the foreign state and

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[19] Referencing a survey in which it found that 90% of 160 nations surveyed "exempt the United States Government from annual property taxes on diplomatic residences," the State Department confirmed the correctness of its Federal Register Notice in a July 18, 2001 diplomatic note to Sweden. U.S. Department of State, Diplomatic Note Sent from the U.S. Department of State to Sweden Concerning Exemption from Real Property Taxes (July 18, 2001) *at* http://www.state.gov/s/l/22686.htm (last visited Apr. 11, 2007). As for the meaning of "common areas," in a separate diplomatic note to Libya, the State Department explained that foreign governments owning buildings used by both tax-exempt diplomatic Missions and non-tax-exempt commercial tenants would not be able to claim tax exemptions for "common areas." U.S. Department of State, Letter to New York Department of Finance concerning Libyan Mission Tax Lien (Apr. 9, 2002) (discussing hold back of 7 floors of Libyan Mission building to commercial tenants) *at* http://www.state.gov/s/l/38710.htm (last visited Apr. 11, 2007).

private actors. In *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania,* 507 F. Supp. 311 (D.D.C. 1980), the dispute was between a foreign state and a commercial shipper. In *Joseph v. Office of the Consulate of Nigeria,* 830 F.2d 1018 (9th Cir. 1987), the action was brought by a private lessor whose house was damaged by consular employees. These cases are consistent with the FSIA's legislative history and this Court's definition of "commercial" activity as requiring a showing of the "foreign state's participation in the marketplace in the manner of a private citizen or corporation." *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992). *See also* Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 94th Cong. 27 (1976) ("when a foreign state enters the marketplace," it cannot avoid "the economic costs of the agreement which it may breach").

In contrast, housing Mission staff on Mission premises because the foreign sovereign has determined that their presence is required to perform their diplomatic and governmental duties does not involve any entry of the foreign sovereign into any marketplace. Rather, the activity at issue in the instant cases is entirely between the Governments of India and Mongolia and their own diplomatic staffs, whose employment relationship is governed wholly by the laws of those two nations (and in the case of India, by the 37-page "Handbook of Rules and Regulations Relating to the Indian Foreign Service," set out at J.A. 102-139). *See, e.g., Broadbent v. Organization of American States,* 628 F.2d 27, 34-36 (D.C. Cir. 1980) (OAS immune from wrongful discharge claim by its administrative staff members). Accordingly, the City's alternative reliance on the "commercial activity" exception in 28 U.S.C. § 1605(a)(2) provides no basis for jurisdiction.

CONCLUSION

Petitioners respectfully request that the judgment of the Second Circuit be reversed.

Respectfully submitted,

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